Yap Boon Kong & Anor v Yap Kok Foo and another suit

HIGH COURT (SHAH ALAM) — CIVIL SUIT NOS BA-22NCVC-105–02 OF 2016 AND BA-22NCVC-337–06 OF 2016
SM KOMATHY J
25 OCTOBER 2019

Landlord and Tenant — Rent — Double rent — Plaintiffs claimed double rent from defendant — Whether plaintiffs entitled to claim for double rental — Whether defendant a trespasser

Landlord and Tenant — Rent — Rental arrears — Plaintiffs claimed for rental arrears from defendant — Whether plaintiffs entitled to claim for rental arrears from defendant — Whether plaintiff allowed defendant to stay rent free at the premises — Vacant possession — Whether notices to quit given by plaintiff to defendant valid

Trusts and Trustees — Resulting trust — Purchase of property in joint names — Defendant purchased agricultural land and registered under first plaintiff and defendant's name — Whether land was a gift from defendant — Whether first plaintiff merely held the land on trust for defendant

This trial was a consolidated action between the plaintiffs' and the defendant. It arises out of the breakdown of trust and friendship between two close friends, namely the first plaintiff and the defendant. The plaintiffs owned a workshop and the defendant sent his lorries for repair and servicing. The plaintiffs at the material time owned several properties: (a) three residential properties in Cheras ('Lot 17, Lot 19 and Lot 20'); (b) two residential properties and four vacant lots in Cheras ('lot 9, lot 413 and the four odd lots'); and (c) two parcels of land in Jelebu ('Lot 6099 and Lot 2355'). The plaintiffs rented out Lot 17, Lot 19 and Lot 20 to the defendant pursuant to three separate tenancy agreements. Not long thereafter the defendant and the first plaintiff decided to embark to a joint-venture project for mutual benefit. The defendant fulfilled the obligation under the joint-venture by purchasing four parcels of agricultural land in Jelebu for RM999,368.20 ('the four Jelebu agricultural lands') and registered them in his and the first plaintiff's joint names. The purchase price was paid solely by the defendant. Sometime in 2014, the longstanding relationship between the first plaintiff and the defendant soured and deteriorated to such an extent that on 3 December 2014, the former issued legal notices to the latter to vacate Lot 17, Lot 19 and Lot 20. The defendant

ignored the notices. On 21 January 2015, the plaintiffs' instituted three suits against the defendant at the Kuala Lumpur Sessions Court for vacant possession. By his defence, the defendant pleaded that the notices to quit were invalid as the plaintiffs had orally agreed to allow him to stay at Lot 17, Lot 19 and Lot 20 rent free until the latter repaid a RM3m loan and other monies that they had taken from him. The defendant counterclaimed for repayment of these loans. The three suits were on 21 April 2015 transferred from the sessions court to the Kuala Lumpur High Court ('the KLHC suits'). In May 2015, the plaintiffs' attempted to evict the defendant from Lot 17, Lot 19 and Lot 20 by disconnecting electricity and water supply to the premises. Whereupon, on 25 May 2015, the defendant commenced proceedings against the plaintiff to re-connect the electricity and water supply to the premises. On 22 June 2015 the Kuala Lumpur High Court allowed the defendant's application. On 25 February 2016, the plaintiffs' instituted another suit in the Shah Alam High Court ('Shah Alam suit') against the defendant. The plaintiffs' claimed arrears of rental in respect of his other properties, namely Lot 9, Lot 413 and the four odd lots, and the payment for services rendered in repairing the defendant's vehicles and for the supply of lubricants. The plaintiffs' also went on to explain that the payment of RM560,000 received from the defendant was intended to be part payment for the cost of maintenance of the defendant's vehicles, supply of lubricants and unpaid rental for Lot 9, Lot 413 and the four odd lots. The KLHC suits were subsequently transferred to Shah Alam High Court and consolidated with the Shah Alam suit. The reliefs sought by the plaintiffs are: (i) arrears of rental, vacant possession and double rental respect of Lot 17, Lot 19 and Lot 20; (ii) arrears of rental in respect of Lot 9, Lot 413 and the four odd lots; and (iii) a sum of RM596,799.10 for services rendered in repairing the defendants vehicles. The reliefs sought by defendant in counterclaim are: (1) the repayment of a friendly loan of RM3m; (2) a declaration that the first plaintiff was holding his half share in the four Jelebu agricultural properties on trust for him and for the transfer of the same to him; (3) a declaration that he was the beneficial owner of Lots 6099 and 2355 held in trust by the first plaintiff for him and for the transfer of the same; (4) the plaintiffs' to deliver and transfer four motor vehicles to him; and (5) an order for the rendering of accounts in respect of the joint-venture project.

Held:

(1) The court found that the defendant had utterly failed to discharge the evidential burden that he bore following the evidence given by the plaintiffs. The defendant failed to prove that the plaintiffs' had agreed to allow him to stay rent free at their premises or that he had given huge loans to the plaintiffs. There were no contemporaneous documents evidencing the alleged oral agreement or the loans. Apart from the self-serving testimony of the defendant, the defendant produced no other evidence. The onus of proving the existence of this oral agreement and

the loans was on the defendant. The court drew the conclusion that it was not safe to accept the defendant's testimony as it was unsubstantiated. The court held that the notices to quit issued to the defendant were valid. The plaintiffs were entitled to enter judgment for the sum of RM24,500 as arrears of rental and vacant possession. It was common ground that double rental under the Civil Law Act 1956 was at the discretion of the court. As the court found insufficient evidence to support the defendant's claim, the plaintiffs' claim for double rental was allowed (see paras 22 & 24–27).

(2) The court preferred the evidence of the defendant to that of the plaintiffs'. If indeed the statements of account relied on by the plaintiffs' were contemporaneous documents, it was striking and surprising that they were never sent to the defendant until this action was filed in court. The existence of a separate statement of account for Lot 9, Lot 43 and the four odd lots contradicts and was inconsistent with the plaintiffs' evidence that there was a running account. The evidence showed separate statements of account were prepared for the servicing of the lorries, sale of lubricants and the rental due on the lots. In the circumstances, the plaintiffs' allegation that this was a running account, undoubtedly called for an explanation but none was proffered. The plaintiffs' explained that the amount was high as the defendant had defaulted since September 2007. If it was true, it was inconceivable the plaintiff's would have waited nine years to institute the present action. The court found it more likely than not the plaintiffs had fabricated the supporting documents to improve their chances of succeeding in the present action (see paras 33–37).

(3) The plaintiffs' had pleaded that no invoices were issued to the defendant for the repair of vehicles as their relationship with the defendant was based on trust. The contemporaneous documents prepared soon after the repair works were done but were never issued to the defendant. The plaintiffs' evidence was contrary to their pleaded case and their explanation did not inspire confidence. The plaintiffs proffered no explanation as to why there was a separate account for the repair of the lorries and the sale of lubricants if indeed the plaintiffs allegation of a running account was true. The court found that the plaintiffs had failed to prove their claim (see paras 41–42).

(4) The court was satisfied and found that the defendant had failed to prove that he had given a RM3m loan to the plaintiffs. There was an absence of any contemporaneous evidence to support the loan. It was improbable that the defendant would have advanced such a huge loan without obtaining some sort of acknowledgment from the plaintiffs (see paras 44–45).

(5) In the absence of clear evidence of an intention by the defendant to share the ownership of the agricultural lands, the presumption of a resulting trust would be presumed in favour of the defendant as he had provided the entire purchase price for the lands. The presumption was that the defendant intended to obtain the equitable entire interest in the lands acquired and as the first plaintiff did not provide the purchase money, the latter will be presumed to hold the legal title on trust for the defendant. The onus was on the first plaintiff to rebut the presumption by evidence that the defendant intended to make a gift, ie that the defendant had no intention to retain any beneficial interest in the property. On the evidence, the first plaintiff failed to do so. As there was no evidence to contradict the presumption that the first plaintiff held the land on trust, it would prevail. The defendant was accordingly entitled to the declarations sought that the first plaintiff was holding the half share in the four Jelebu agricultural properties on trust for him (see paras 52–53).

(6) The defendant in his evidence claimed that he had given the first plaintiff RM2m for the joint-venture. He added that the plaintiffs' had utilised the RM2m to purchase the properties. He alleged that he was therefore the beneficial owner of the properties. Apart from the defendant's oral assertion, there was no other evidence that corroborated or supported the defendant's claim that he had given RM2m for the joint-venture. The evidence led by the defendant fell far short of establishing that the plaintiffs had used the defendant's monies to purchase the properties (see paras 56–57).

(7) There was insufficient evidence to support the defendant's claim for the delivery of the four vehicles to him (see para 59).

[Bahasa Malaysia summary

Ini merupakan satu tindakan yang digabungkan antara plaintif dan defendan. Ianya berbangkit daripada kerosakan kepercayaan dan persahabatan antara dua rakan rapat, iaitu plaintif pertama dan defendan. Plaintif-plaintif memiliki satu bengkal dan defendan telah menghantar lori-lorinya untuk servis dan pembaikan. Plaintif pada masa material memiliki beberapa hartanah: (a) tiga hartanah kediaman di Cheras ('Lot 17, Lot 19 dan Lot 20'); dua hartanah kediaman dan empat lot kosong di Cheras ('Lot 9, Lot 413 dan empat lot lain'); dan (c) dua bidang tanah di Jelebu ('Lot 6099 dan Lot 2355'). Plaintif telah menyewakan Lot 17, Lot 29 dan Lot 20 kepada defendan selaras dengan tiga perjanjian sewaan berbeza. Tidak lama kemudian defendan dan plaintif pertama membuat keputusan untuk memasuki satu projek usahasama untuk keuntungan bersama. Defendan telah memenuhi obligasinya dibawah usahasama dengan membeli empat bidang tanah pertanian di Jelebu untuk RM999,368.20 ('empat bidang tanah pertanian Jelebu') dan mendaftarkannya dalam namanya dan nama defendan secara bersama. Harga belian telah dibayar oleh defendan sahaja. Satu ketika dalam tahun 2014, perhubungan antara

plaintif pertama dan defendan telah menjadi tawar dan rosak yang menyebabkan pada 3 Disember 2014, plaintif pertama mengeluarkan notis undang-undang kepada defendan untuk mengosongkan Lot 17, Lot 19 dan Lot 20. Defendan tidak menghiraukan notis undang-undang tersebut. Pada 21 Januari 2015, plaintif memulakan tiga guaman terhadap defendan di Mahkamah Sesyen Kuala Lumpur untuk milikan kosong. Sebagai pembelaan defendan memplidkan bahawa notis keluar adalah tidak sah memandangkan plaintif telah secara lisan bersetuju untuk membenarkannya untuk tinggal di Lot 17, Lot 19 dan Lot 20 tanpa sebaran yuran sewaan sehingga defendan membayar pinjaman RM3 juta dan wang lain yang telah mereka ambil daripadanya. Tiga guaman tersebut telah dipindahkan dari mahkamah sesyen ke Mahkamah Tinggi Kuala Lumpur ('guaman MTTKL'). Pada Mei 2015, plaintif telah cuba untuk mengusir defendan dari Lot 17, Lot 19 dan Lot 20 dengan memotong bekalan elektrik dan air kepada premis tersebut. Pada 22 Jun 2015, Mahkamah Tinggi Kuala Lumpur membenarkan permohonan defendan. Pada 25 Februari 2016, plaintif telah memulakan satu lagi tindakan di Mahkamah Tinggi Shah Alam ('guaman Shah Alam') terhadap defendan. Plaintif menuntut tunggakan sewaan berkenaan dengan hartanah lain miliknya, iaitu Lot 9, Lot 413 dan empat lot lain, dan untuk pembayaran perkhidmatan yang diberikan untuk membaikkan kenderaan defendan dan untuk pembekalan bahan pelincir. Plaintif turut menjelaskan bahawa pembayaran RM560,000 yang diterima oleh defendan yang berniat sebagai sebahagian pembayaran untuk kos penyelenggaraan kenderaan defendan, pembekalan bahan pelincir dan sewa yang tertunggak untuk Lot 9, Lot 413 dan empat lot lain. Guaman MTKL kemudiannya dipindahkan ke Mahkamah Tinggi Shah Alam dan digabungkan dengan guaman Shah Alam. Relif yang dipohon oleh plaintif adalah: (i) tunggakan sewaan, milikan kosong dan dua kali ganda sewaan berkenaan dengan Lot 17, Lot 19 dan Lot 20; (ii) tunggakan sewaan berkenaan dengan Lot 9, Lot 413 dan empat lot lain; dan (iii) jumlah RM596,799.10 untuk perkhidmatan yang diberikan dalam membaikki kenderaan defendan. Relif yang dipohon oleh defendan dalam tuntutan balas adalah: (1) pembayaran semula pinjaman persahabatan RM3 juta; (2) satu deklarasi bahwa plaintif pertama sedang memegang separuh bahagiannya dalam empat hartanah pertanian Jelebu atas amanah untuknya dan untuk pemindahan yang sama kepadanya; (3) satu pengisytiharan bahwa dia adalah pemilik benefisial Lot 6099 dan Lot 2355 yang dipegang secara amanah oleh plaintif pertama untuknya dan untuk pemindahan yang sama; (4) untuk plaintif menyerahkan dan memindahkan empat kenderaan bermotor kepadanya; dan (5) satu perintah mengemukakan akaun berkenaan dengan projek usahasama.

Diputuskan:

(1) Mahkamah mendapati bahawa defendan telah gagal untuk melepaskan beban pembuktian yang wujud padanya berkenaan dengan keterangan

yang dikemukakan oleh plaintif. Defendan gagal untuk membuktikan bahawa plaintif telah bersetuju untuk membenarkan dirinya tinggal tanpa membayar sebarang sewaan di premisnya atau dia telah memberikan pinjaman besar kepada plaintif. Tiada dokumen semasa membuktikan perjanjian lisan atau pinjaman yang dikatakan. Selain daripada keterangan yang memihak kepada diri sendiri defendan, defendan tidak mengemukakan apa-apa keterangan lain. Beban untuk membuktikan perjanjian lisan ini dan pinjaman adalah atas defendan. Mahkamah membuat kesimpulan bahawa ianya tidak selamat untuk menerima keterangan defendan kerana ianya tidak disokong. Mahkamah memutuskan bahawa notis keluar yang dikeluarkan kepada defendan adalah sah. Plaintif berhak untuk memasukki penghakiman untuk jumlah RM24,500 sebagai tunggakan sewaan dan milikan kosong. Adalah juga dipersetujui bahawa sewaan dua kali ganda dibawah Akta Undang-Undang Sivil 1956 adalah dibawah budi bicara mahkamah. Memandangkan mahkamah mendapati tiada keterangan mencukupi untuk menyokong tuntutan defendan, tuntutan plaintif untuk dua kali ganda sewaan adalah dibenarkan (lihat perenggan 22 & 24–27).

(2) Mahkamah memilih keterangan defendan dan bukannya plaintif. Sekiranya benar penyata akaun yang plaintif bergantung kepada adalah dokumen semasa, ianya adalah memeranjatkan bahawa mereka tidak pernah dihantar kepada defendan sehingga tindakan ini difailkan di mahkamah. Kewujudan penyata akaun berbeza untuk Lot 9, Lot 43, dan empat lot lain bercanggah dan tidak konsisten dengan keterangan plaintif bahawa wujud satu akaun yang masih berlangsung. Keterangan menunjukkan penyata akaun yang berbeza disediakan untuk servis lori, penjualan bahan pelincir dan sewa terhutang kepada lot tersebut. Dalam keadaan ini, pengataan plaintif bahawa ini adalah akaun yang masih berlangsung, tanpa sebarang keraguan memerlukan satu penjelasan tapi tiada yang diberikan. Plaintif menjelaskan bahawa jumlah adalah terlalu tinggi kerana defendan telah ingkar sejak September 2007. Jika ianya adalah benar, ianya tidak dapat dibayangkan bahawa plaintif akan menunggu sembilan bulan untuk memulakan tindakan ini. Mahkamah mendapati bahawa ianya lebih berkebarangkalian bahawa bukan plaintif telah mereka dokumen sokongan tersebut untuk membaiki kebarangkalian mereka untuk berjaya dalam tindakan ini (lihat perenggan 33–37).

(3) Plaintif memplidkan bahawa tiada invois yang dikeluarkan kepada defendan untuk pembaikan kenderaan tersebut kerana perhubungan antara defendan dan plaintif adalah berdasarkan kepercayaan. Dokumen semasa yang disediakan sejurus selepas kerja pembaikan dilakukan tidak pernah dihantar kepada defendan. Keterangan plaintif adalah bercanggah dengan kes yang diplid oleh mereka dan penjelasan mereka tidak memberikan keyakinan. Plaintif tidak memberikan penjelasan

mengapa wujud akaun berbeza untuk pembaikan lori dan penjualan bahan pelincir dan sekiranya benar pengataan plaintif bahawa akaun berlangsung wujud. Mahkamah mendapati bahawa plaintif gagal untuk membuktikan tuntutan mereka (lihat perenggan 41–42).

(4) Mahkamah berpuas hati dan mendapati bahawa defendan gagal untuk membuktikan bahawa dia telah memberikan pinjaman RM3 juta kepada plaintif. Wujud ketiadaan apa-apa dokumen semasa untuk menyokong pinjaman tersebut. Ianya tidak berkebarangkalian bahawa defendan akan memajukan sejumlah pinjaman yang amat besar tanpa menerima sebarang akuan daripada plaintif (lihat perenggan 44–45).

(5) Dalam ketiadaan keterangan niat jelas dari defendan untuk berkongsi milikan tanah pertanian tersebut, anggapan amanah berbangkit akan diandaikan pada pihak defendan memandangkan dia telah mengemukakan keseluruhan harga belian untuk tanah tersebut. Andaian adalah defendan berniat untuk memperoleh keseluruhan kepentingan dalam tanah yang diperoleh keseluruhan ekuiti kepentingan dalam tanah yang diperoleh dan memandangkan plaintif pertama tidak mengemukakan wang belian, defendan akan dianggap untuk memegang milikan undang-undang atas amanah untuk defendan. Beban adalah pada plaintif pertama untuk mematahkan anggapan dengan keterangan bahawa defendan bertujuan untuk memberikan satu hadiah, iaitu bahawa defendan tiada niat untuk mempunyai apa-apa kepentingan benefisial dalam hartanah tersebut. Berdasarkan keterangan, plaintif pertama gagal untuk berbuat sedemikian, memandangkan tiada keterangan untuk menyangkal anggapan bahawa plaintif pertama memegang separuh bahagian dalam empat hartanah Jelebu atas amanah tersebut untuknya (lihat perenggan 52–53).

(6) Defendan dalam keterangannya menuntut bahawa dia telah memberikan plaintif pertama RM2 juta untuk usahasama tersebut. Dia turut berhujah bahawa plaintif telah menggunakan RM2 juta untuk membeli hartanah tersebut. Adalah pengataanya bahawa dia adalah pemilik benefisial hartanah tersebut selain daripada pengataan lisan defendan, tiada keterangan lain yang disokong atau menyokong tuntutan defendan bahawa dia telah memberikan RM2 juta untuk usahasama tersebut . Keterangan yang dikemukakan oleh defendan tidak mencukupi untuk membuktikan bahawa plaintif telah menggunakan wang defendan untuk membeli hartanah tersebut (lihat perenggan 56–57).

(7) Tiada keterangan memadai untuk menyokong tuntutan defendan untuk penyerahan empat kenderaan tersebut kepadanya (lihat perenggan 59).]

Cases referred to

Step Furniture Manufacturer Sdn Bhd v Tenaga Nasional Berhad [2017] MLJU 37, HC (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669; [1996] 2 All ER 961, HL (refd)

Legislation referred to

Civil Law Act 1956 s 28(4)(a)

Ben Lee Kam Foo (Nur Amalin Shahida Sabidi and HM Shim with him) (Gan & Zul) for the plaintiffs.
Godfrey Thomas Fernandez (GT Fernandez & Co) for the defendants.

SM Komathy J:

THE TRIAL

[1] This is the trial of a consolidated action between the plaintiffs' and the defendant. It arises out of the breakdown of trust and friendship between hitherto two close friends, namely the first plaintiff and the defendant. The second plaintiff is the wife of the first plaintiff.

BACKGROUND FACTS

[2] The events that led to these proceedings, save where otherwise indicated, were all agreed or not disputed.

[3] The first plaintiff and the defendant have been good friends for over 20 years and during this period had many business dealings with each other. The plaintiffs owned a workshop and the defendant sent his lorries there for repair and servicing.

[4] The plaintiffs at the material time owned several properties:

(a) three residential properties in Cheras ('Lot 17, Lot 19 and Lot 20');

(b) two residential properties and four vacant lots in Cheras ('Lot 9, Lot 413 and the four odd lots'); and

(c) two parcels of lands in Jelebu ('Lot 6099 and Lot 2355').

[5] Between 2005 and 2006, the plaintiffs rented out Lot 17, Lot 19 and Lot 20 to the defendant pursuant to three separate tenancy agreements.

[6] The relationship between the parties was good. Not long thereafter the defendant and the first plaintiff decided to embark to a joint-venture project for mutual benefit on these terms:

(a) the defendant would bear all costs in respect of the purchase of four agricultural properties;

(b) that agricultural properties would be registered in the names of the defendant and the first plaintiff;

(c) that the defendant would provide the capital and the plaintiff would clear the bushes on the lands and prepare it for cultivation of oil palm; and

(d) that profits from the joint-venture would be shared equally between them.

[7] The defendant fulfilled his obligation under the joint-venture by purchasing four parcels of agricultural land in Jelebu for RM999,368.20 ('the four Jelebu agricultural lands') and registered them in his and the first plaintiff's joint names. The purchase price was paid solely by the defendant.

[8] Unfortunately, sometime in 2014, the longstanding relationship between the first plaintiff and the defendant soured and deteriorated to such an extent that on 3 December 2014, the former issued legal notices to the latter to vacate Lot 17, Lot 19 and Lot 20. The defendant ignored the notices.

[9] On 21 January 2015, the plaintiffs' instituted three suits against the defendant at the Kuala Lumpur Sessions Court for vacant possession. By his defence, the defendant pleaded that the notices to quit were invalid as the plaintiffs had orally agreed to allow him to stay at Lot 17, Lot 19 and Lot 20 rent free until the latter repaid a RM3m loan and other monies that they had taken from him. The defendant counterclaimed for repayment of these loans:

(a) a friendly loan of RM3m given between 2008–2013;

(b) a loan of RM2m given the first plaintiff between 2009–2013 for the joint-venture project;

(c) a loan of RM50,000 given to the first plaintiff for the purpose of purchasing machinery, vehicles, equipment, seedlings, fertilisers etc for use in the joint-venture project; and

(d) a sum of RM26,000 he had paid on behalf the first plaintiff for the purchase of a Toyota Hilux.

[10] The three suits were on 21 April 2015 transferred from the sessions court to the Kuala Lumpur High Court ('the KLHC suits').

[11] In May 2015, the plaintiffs' attempted to evict the defendant from Lot 17, Lot 19 and Lot 20 by disconnecting electricity and water supply to the premises. Whereupon, on 25 May 2015, the defendant commenced proceedings against the plaintiff to re-connect the electricity and water supply to the premises. At the hearing of this application, the defendant produced evidence that demonstrated that he had issued cheques to the first plaintiff totalling RM560,000. On 22 June 2015 the Kuala Lumpur High Court allowed the defendant's application.

[12] On 25 February 2016, the plaintiffs' instituted another suit in the Shah Alam High Court vide Civil Suit No BA-22NCVC-105–02 of 2016 ('Shah Alam suit') against the defendant. In this suit, the plaintiffs' claimed arrears of rental in respect of his other properties, namely Lot 9, Lot 413 and the four odd lots, and the payment for services rendered in repairing the defendant's vehicles and for the supply of lubricants. The plaintiffs' also went on to explain that the payment of RM560,000 received from the defendant was intended to be part payment for the cost of maintenance of the defendant's vehicles, supply of lubricants and unpaid rental for Lot 9, Lot 413 and the four odd lots.

[13] The KLHC suits were subsequently transferred to Shah Alam High Court and consolidated with the Shah Alam suit.

RELIEF SOUGHT BY THE PLAINTIFF

[14] The reliefs sought by the plaintiffs in this consolidated action can be summarised as follows:

(a) arrears of rental, vacant possession and double rental respect of Lot 17, Lot 19 and Lot 20;

(b) arrears of rental in respect of Lot 9, Lot 413 and the four odd lots; and

(c) a sum of RM596,799.10 for services rendered in repairing the defendants vehicles.

RELIEFS SOUGHT BY DEFENDANT IN COUNTERCLAIM

[15] By his counterclaim, the defendant sought:

(a) the repayment of a friendly loan of RM3m;

(b) a declaration that the first plaintiff was holding his half share in the four Jelebu agricultural properties on trust for him and for the transfer of the same to him;

(c) a declaration that he was the beneficial owner of Lots 6099 and 2355 held in trust by the first plaintiff for him and for the transfer of the same;

(d) the plaintiffs' to deliver and transfer four motor vehicles to him; and

(e) an order for the rendering of accounts in respect of the joint-venture project.

WITNESSES

[16] Both plaintiffs gave evidence and called four witnesses in support of their case. The defendant called four witnesses. There was a serious conflict and divergence in the evidence on all the matters in dispute. Both sides alleged that the evidence which their opponents gave on the facts in dispute consisted of lies.

[17] The approach that a trial court should take in resolving stark conflicts of evidence in a case is found in the following passage in the judgment of Chang Min Tat FJ in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, where he said:

> ... the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity ...

[18] With this approach in mind, I turn now to the evidence in this case.

THE PLAINTIFFS' CLAIM: LOT 17, LOT 19 AND LOT 20

[19] The plaintiffs' in their evidence said that the monthly rental for the three lots was RM3,500. They said that a sum of RM24,500 was outstanding being unpaid rentals for seven months. The plaintiffs' strenuously denied, first, the existence of any oral agreement to allow the defendant to stay rent free and; secondly, that they had taken any loans from the defendant.

[20] The defendant's version of the facts was as follows. He testified that he paid rental to the plaintiffs' only during the early part of the tenancy. Thereafter, the plaintiffs agreed to allow him to occupy the properties for free until they were able to repay the RM3m friendly loan they had taken from him and the other loans mentioned in his counterclaim. According to him, the

loans were given to the plaintiffs' by way of cash and cheques between 2008 and 2013. He added that as the plaintiffs delayed in the repayment of the loans, they agreed to let him stay rent free and also promised to transfer the three lots to him if they defaulted.

[21] This court was faced with the task of deciding a factual issue on which there was a serious conflict in the evidence.

[22] The onus of proving the existence of this oral agreement and the loans was on the defendant. There were no contemporaneous documents evidencing the alleged oral agreement or the loans. Apart from the self serving testimony of the defendant, he produced no other evidence. In my judgment it was simply not credible for the defendant to assert that he had given a RM3m loan and other loans without adducing cogent evidence of the same. He did not explain his inability to produce compelling evidence to support his case. The conclusion that I drew from this paucity of evidence was that it was not safe to accept the defendant's testimony as it was unsubstantiated.

[23] It is true that the evidence shows that the defendants had issued cheques for the value of RM560,000 to the plaintiffs, but there was no credible evidence to indicate the purpose of these payments. There was evidence that the defendant sent his lorries to the plaintiffs for repair and this could very well have been payment for services rendered as alleged by the plaintiffs. The defendant also led evidence to show that he had withdrawn over RM2m from his RHB bank account between 2008 and 2013. But, this evidence did not ipso facto justify an inference that the defendant had given these monies to the plaintiff as alleged.

[24] I found that the defendant had utterly failed to discharge the evidential burden that he bore following the evidence given by the plaintiffs. He failed to prove that the plaintiffs' had agreed to allow him to stay rent free at their premises or that he had given huge loans to the plaintiffs.

[25] Accordingly, I held that the notices to quit issued to the defendant were valid. The plaintiffs were entitled to enter judgment for the sum of RM24,500 being arrears of rental and vacant possession.

[26] That brings me to the plaintiffs claim for double rental. Counsel for the plaintiffs' argued that the defendant as tenant had wrongfully failed to give up possession of the premises, and was a trespasser, and was liable to pay double rent under s 28(4)(a) of the Civil Law Act 1956 until vacant possession is given.

[27] It was common ground that double rental under the Civil law Act 1956 is at the discretion of the court. Counsel for the defendant urged the court to

exercise its discretion in favour of the defendant as he had advanced huge loans to the plaintiffs.' As I had found insufficient evidence to support the defendant's claim, I allowed the plaintiffs' claim for double rental.

THE PLAINTIFFS' CLAIM — ARREARS OF RENTAL IN RESPECT OF LOT 9, LOT 413 AND FOUR ODD LOTS

[28] That brings me to the plaintiffs claim for arrears of rental in respect of Lot 9, Lot 413 and the four odd lots.

[29] The plaintiffs testified that the defendant had rented these six lots from them pursuant to an oral agreement. They relied on the testimonies of the first plaintiff's brother and friend who gave evidence to the effect that they had seen the defendant park his lorries on the four odd lots. As supporting evidence, the plaintiffs' produced statements of account prepared by them. The statements indicated that the defendant owed RM18,900 and RM39,500 and RM237,000 for Lot 9, Lot 43 and the 4 odd lots, respectively, as arrears of rental.

[30] The plaintiffs further testified that a running account was created for the convenience of the defendant for the payment of the rental for these six lots and servicing of his vehicles and the supply of lubricants. According to them, the sum of RM560,000 received from the defendant was credited into the running account as part payment.

[31] Under cross-examination, the plaintiffs' acknowledged that no invoices or receipts were issued to the defendant during the existence of the alleged tenancy and that the statement of account produced was only sent to the defendant after this action was filed. They further acknowledged that no notice of demand was sent to the defendant before the filing of the Shah Alam suit to claim the arrears of rental for the six lots here. It was also established during cross-examination that the first plaintiffs' brother and friend had no personal knowledge as regards whether the plaintiffs had rented out the four odd lots to the defendant. It was also put to the plaintiffs under further cross-examination that their evidence that there was a running account was a lie fabricated to overcome the defence of limitation that may avail the defendant.

[32] I now turn to the evidence of the defendant. The defendant vehemently denied that he had rented the six lots from the plaintiffs and also denied that the transactions between them were recorded in a running account.

[33] The burden was on the plaintiffs' to prove the existence of the oral tenancy and the running account. There was a grave conflict of evidence on this issue. It was difficult to avoid the conclusion that one side had given evidence

which it must have known to be untrue. Having considered the evidence given by the parties, I preferred the evidence of the defendant to that of the plaintiffs' for the following reasons.

[34] First, if indeed the statements of account relied on by the plaintiffs' were contemporaneous documents, it was striking and surprising that they were never sent to the defendant until this action was filed in court.

[35] Secondly, the existence of a separate statement of account for Lot 9, Lot 43 and the four odd lots contradicts and was inconsistent with the plaintiffs evidence that there was a running account. A running account comes into existence when the debtor creditor relationship of the parties is recorded in one entire account into which all liabilities and payments are carried in order of date as the course of dealing extending over a considerable period, see *Step Furniture Manufacturer Sdn Bhd v Tenaga Nasional Berhad* [2017] MLJU 37. But, the evidence here showed separate statements of account were prepared for the servicing of the lorries, sale of lubricants and the rental due on the lots. In the circumstances, the plaintiffs' allegation that this was a running account, undoubtedly called for an explanation but none was proffered.

[36] Thirdly, it was a material aspect of the plaintiffs' case that the defendant owed RM237,000 as outstanding rental in respect of the four odd lots. In their evidence the plaintiffs' explained that the amount was high as the defendant had defaulted since September 2007. If this was true, it was inconceivable the plaintiff's would have waited nine years to institute this action.

[37] For these reasons I disbelieved the plaintiffs' evidence on this head of the claim. I found it more likely than not the plaintiff's had fabricated the supporting documents to improve their chances of succeeding in this action.

REPAIR/LUBRICANTS

[38] The plaintiffs last head of claim was for payment due for services rendered to repair the defendant's vehicles and the sale of lubricants to him.

[39] It was not in dispute that the first plaintiff had a workshop and the defendant had been his customer. The plaintiffs in support of their claim produced invoices/repair bills and a statement of account. They said that payments received from the defendant were credited into a running account. Under cross-examination, the plaintiffs' acknowledged that the invoices, repair bills and the statement of account were never sent to the defendant prior to the filing of this action. They further acknowledged that no written demand was made on the defendant to pay the amount alleged for repairs done prior to the filing of the Shah Alam suit to recover the same.

A **[40]** The defendant's version was as follows. He admitted he had sent his lorries to the plaintiffs' and also bought lubricants from them. However, he maintained that he had paid the plaintiffs' for the work done and lubricants. According to him, he had requested the plaintiffs' to issue receipts for the payments made, but the latter had declined to do so. He also strenuously
B denied a running account was maintained as alleged by the plaintiffs.

[41] There was again a sharp conflict in evidence between the parties on this head of claim. Again, I preferred the evidence of the defendant to that of the
C plaintiff. The plaintiffs' had pleaded that no invoices were issued to the defendant for the repair of vehicles as their relationship with the defendant was based on trust. However, contrary to that position, at the trial, they produced copious invoices and a statement of account. According to them these were contemporaneous documents prepared soon after the repair works were done
D but were never issued to the defendant. The plaintiffs' evidence was contrary to their pleaded case and their explanation did not inspire confidence. The plaintiffs also proffered no explanation as to why there was a separate account for the repair of the lorries and the sale of lubricants if indeed the plaintiffs allegation of a running accountwas true.

E

[42] For the reasons given, I found that the plaintiffs had failed to prove their claim under this head.

COUNTERCLAIM

F

[43] I now turn to the defendant's counterclaim.

RM3M FRIENDLY LOAN

G **[44]** The gravamen of the defendant's evidence on the friendly loan of RM3m was that it was given to the plaintiffs' between 2008 and 2013 in cash and cheques. I have dealt with this claim in para 22 of this judgment. As noted earlier, there was an absence of any contemporaneous evidence to support the
H loan. It was improbable that the defendant would have advanced such a huge loan without obtaining some sort of acknowledgment from the plaintiffs.

[45] Accordingly, I was satisfied and found that the defendant had failed to prove that he had given a RM3m loan to the plaintiffs'.

I

THE FOUR AGRICULTURAL LANDS IN JELEBU

[46] It was the defendants' pleaded case that the four agricultural lands in Jelebu were bought under the joint-venture and registered under his and the first plaintiff's names. He therefore sought a declaration that the first plaintiff held them on trust for him.

[47] The plaintiffs' in their defence denied the existence of joint-venture between the first plaintiff and the defendant. However, at trial, the plaintiffs' acknowledged the joint-venture project and that it was the defendant who had contributed to the full purchase price and registered the lands under their joint names.

[48] In his evidence, the defendant testified that it was never his intention to give the four agricultural lands to the first plaintiff as a gift. The defendant alleged that any interest the first plaintiff held in the agricultural lands was held on resulting trust for him. He further testified that contrary to his obligations under the joint-venture, the first plaintiff had made no effort to improve or clear the land for the cultivation of oil palm to claim any interest in the land.

[49] On the other hand, the first plaintiff's version of events was this. He said that the defendant had told him orally that the lands were a gift to him for working jointly with him under the joint-venture. He denied the defendant's allegation that he had made no efforts to improve or clear the land. According to him, he had contributed to improvement of the lands by clearing the bushes but could not continue further because his relationship with the defendant had broken down by then. He denied the defendant's allegation that he held the lands on trust.

[50] The circumstances in which property will become the subject to a resulting trust were examined by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at p 708; [1996] 2 All ER 961, as follows:

> Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a *presumption*, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer: see Underhill and Hayton, *Law of Trusts and Trustees*, pages 317 et seq; *Vandervell v IRC* [1967] 2 AC 291, 312 et seq; In *Re Vandervell's Trusts (No 2)* [1974] Ch 269, 288 et seq (B) Where A transfers property to B on

express trusts, but the trusts declared do not exhaust the whole beneficial interest: ibid. and *Quistclose Investments Ltd v Rolls Razor Ltd (In Liquidation)* [1970] AC 567. Both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention. Megarry J in *In Re Vandervell's Trusts (No 2)* suggests that a resulting trust of type (B) does not depend on intention but operates automatically. I am not convinced that this is right. If the settlor has expressly, or by necessary implication, abandoned any beneficial interest in the trust property, there is in my view no resulting trust: the undisposed-of equitable interest vests in the Crown as bona vacantia: see *In Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts* [1971] Ch 1.

[51] It is clear from the foregoing that a contribution to the purchase price of land will give rise to a presumption of a resulting trust (see also *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751). This rule is however subject to an exception where the purchaser is under a species of natural obligation to provide for the nominee. In these circumstances, the law presumes that a gift was intended and that the person who contributed to the purchase price did not intend to retain any interest in the property. This is referred to as the presumption of advancement. In the present instance, there was no presumption of an advancement in favour of the first plaintiff as the relationship between the parties did not come within any of the special categories.

[52] In the present case, there was a serious conflict in the evidence as to the common intention of the parties in acquiring the properties and as to how the beneficial interest in the properties was to be held. What was clear however was that the primary purpose of the purchase of the property was as an investment. In the absence of clear evidence of an intention by the defendant to share the ownership of the agricultural lands, the presumption of a resulting trust would be presumed in favour of the defendant as he had provided (or contributed) the entire purchase price for the lands. The presumption was that the defendant intended to obtain the equitable entire interest in the lands acquired and, as the first plaintiff did not provide the purchase money, the latter will be presumed to hold the legal title on trust for the defendant.

[53] The onus was on the first plaintiff to rebut the presumption by evidence that the defendant intended to make a gift, ie that the defendant had no intention to retain any beneficial interest in the property. On the evidence, I was satisfied that this the first plaintiff failed to do so. As there was no evidence to contradict the presumption that the first plaintiff held the land on trust, it would prevail. The defendant was accordingly entitled to the declarations sought that the first plaintiff was holding the half share in the four Jelebu agricultural properties on trust for him.

LOTS 6099 AND 2355

[54] The defendant in his pleadings also sought a declaration that the plaintiffs' also held Lot 6099 and Lot 2355 in trust for him.

[55] The evidence in respect of this claim was as follows. The plaintiffs' became the registered proprieters of Lot 6099 and Lot 2355 on 11 August 2011 and 4 July 2014, respectively. The properties were purchased for RM120,000 and RM160,000, respectively. The plaintiffs' testified that they had used their own monies to purchase the said properties.

[56] The defendant in his evidence claimed that he had given the first plaintiff RM2m for the joint-venture. He added that the plaintiffs' had utilised the RM2m to purchase the properties. He alleged that he was therefore the beneficial owner of the properties.

[57] Apart from the defendant's oral assertion, there was no other evidence that corroborated or supported his claim he had given RM2m for the joint-venture. The absence of evidence was staggering, particularly when one considers that the sum given was RM2m. The evidence led by the defendant fell far short of establishing that the plaintiffs had used the defendant's monies to purchase the properties.

[58] In any event, if indeed a loan was given as alleged, and the same was used by the plaintiffs to purchase the properties, I failed to see how this would give the defendant a beneficial interest in the same. No authorities were cited in support of the position taken.

MOTOR VEHICLES

[59] The defendant conceded there was insufficient evidence to support his claim for the delivery of the four vehicles too him.

CONCLUSION

[60] For the reasons given:

(a) I allowed the plaintiffs claim for arrears of rental, vacant possession and double rental allowed in respect of Lots 17, 19 and 20 allowed; all other heads of the plaintiffs' claims were dismissed; and

(b) I allowed the defendant's claim for a declaration that the first plaintiff held the agricultural lands on trust for him. All other heads of claims by defendant were dismissed.

Order accordingly.

Reported by Mohd Kamarul Anwar